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In The

Supreme Court of the United States

October Term, 1975

No. 75-1020

PAULA DALLAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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No.

PAUL DALLAL,

Petitioner,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Paula Dallal, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 19, 1975, affirming petitioner's conviction in the United States District Court for the Eastern District of New York (Appendix A, *infra*, 1a).

OPINIONS BELOW

No opinion was rendered by the Court of Appeals or by the District Court.

JURISDICTION

The jurisdiction of the Court is invoked under provisions of 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The indictment upon which petitioner was tried and convicted alleged violations of 18 U.S.C. §2 and 21 U.S.C. §§ 841(a)(1), 846.

QUESTION PRESENTED

Was the court's charge on the issue of entrapment defective and did it deprive the petitioner of a fair determination of a crucial issue in the case?

STATEMENT

Petitioner's conviction in the United States District Court for the Eastern District of New York for distribution and conspiracy to distribute cocaine hydrochloride was affirmed by the Court of Appeals for the Second Circuit, without opinion.

Petitioner was charged in Count 1 of the indictment with distribution of approximately three-quarters of an ounce of cocaine hydrochloride, in Count 2 with distribution of approximately one ounce of cocaine hydrochloride and in Count 4 with conspiracy to distribute quantities of cocaine hydrochloride.

Alfred Cavuto, a special agent with the Drug Enforcement Administration testified that a government undercover informant was given $800 to introduce him (Cavuto) to the petitioner, who in turn introduced him to one O'Brien from whom drug purchases were made. He called and spoke to the petitioner twelve or thirteen times importuning her to aid him in purchasing cocaine.

Petitioner testified she was 23 years of age and never before in trouble; that the government through its agent Cavuto and informant Jeff initiated an unremitting barrage of calls and visits to enmesh her in the commission of a crime. Jeff called her approximately twenty times and visited her apartment eight times cajoling her to get cocaine for his friend Al (Cavuto). The informant Jeff relentlessly continued to entreat and implore her to get cocaine for his "friend" notwithstanding that she would tell him that she was unable to do it. He called her four and five times a day. She testified that the calls were so frequent and the demands so incessant that in order to avoid further contact she pretended she had to visit a sick father in Japan, and that ". . . the only way I could think they would leave me alone was if I told them I was going to Japan . . . ." She continued, "...Can't you just leave me alone . . . ."

She instructed her roommate to tell him that she was out. Similarly, Cavuto, in this attempt to have petitioner affect an introduction with the seller O'Brien spoke to her fourteen or fifteen times.

She further testified that she uses barbituates; that she dealt with the seller O'Brien once before and offered to sell agent Cavuto marijuana and amphetamines.

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REASON FOR GRANTING THE WRIT

The Court's instructions to the jury on the subject of entrapment was fatally defective in that it failed to properly place the burden on the government to disprove the whole defense; thus depriving the petitioner of a fair trial.

Since the proof indicated that the government initiated the events charged in the indictment, the petitioner raised the defense of entrapment on that subject, the court incorrectly charged the jury over counsel's objection. Thus:

> ". . . The question of entrapment involves two issues. The first issue is whether the defendant was led or induced to commit the crime by anyone acting for the government. That is, did the government initiate the criminal transaction? On this issue the defendant has the burden of proof. He does not have to prove it beyond a reasonable doubt but he must prove it by a fair preponderance more likely than not that the government initiated the criminal transaction involved in this case. If you do not find such inducement then there was no entrapment, but if you do find such inducement then you must consider the second issue.
>
> The second issue is whether the defendant was ready and willing to commit the crime without persuasion. This is sometimes expressed as an issue of whether he had a propensity to

> commit the crime. On this issue the government has the burden of proof and it must prove it beyond a reasonable doubt. . . ."

The Court in the case *United States v. Braver*, 450 F.2d 799 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972), approved the language in *United States v. Berger*, 433 F.2d 680, 684 (2d Cir. 1970), *cert. denied*, 401 U.S. 962, that a defendant had to:

> "[A]dduce some evidence that a government agent by initiating the illegal conduct himself induced the defendant to commit the offense. If you find that the defendant . . . has adduced such evidence then the government must prove beyond a reasonable doubt that the inducement was not the cause of the crime, that is, that the defendant . . . was ready and willing to commit the offense."

The Court in *Braver* continued on pp. 804 and 805:

> "In light of all of this, we suggest that it would be preferable for the district courts of this circuit to use an entrapment charge that does not give to the jury two ultimate factual issues to decide on two different burdens of persuasion imposed upon two different parties. While we do not specifically define this preferable charge, we suggest that there be no reference to 'burden' or 'burden of proof' or 'preponderance of evidence' in describing a defendant's obligation. In

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> explaining the burden of proof on entrapment, it will be enough to tell the jury that if it finds some evidence of government initiation of the illegal conduct, the Government has to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime. The language quoted from *United States v. Berger, supra,* would obviously be appropriate."

Notwithstanding this clear instruction, the trial judge instructed the jury that on the issue of the government's initiation of the criminal transaction, ". . . the defendant has the burden of proof . . ." and ". . . must prove it by a fair preponderance of the evidence."

Other circuits have indicated their preference for the unitary charge, that is, they have approved entrapment instructions that do not separate the issues of inducement and propensity and do not impose a burden on the defendant to prove any element of the entrapment defense by either a "burden of proof" or "preponderance."

"The issues having appeared, it becomes the prosecution's burden to establish beyond a reasonable doubt that the accused was not entrapped into the commission of the offense," *Notaro v. United States,* 363 F.2d 169 (9th Cir. 1966). See *Kadis v. United States,* 373 F.2d 370 (1st Cir. 1967); *United States v. Cohen,* 431 F.2d 830, 832 (2d Cir. 1970); *United States v. Riley,* 363 F.2d 955, 958-959 (2d Cir. 1966); *United States v. DeVore,* 423 F.2d 1069 (4th Cir. 1970); *Robinson v. United States,* 366 F.2d 575 (10th Cir. 1966); *Lucas v. United States,* 355 F.2d 245 (10th Cir. 1966).

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In *United States v. Watson*, 480 F.2d 504 (3rd Cir. 1973) the Court held at pages 510 and 511:

> "This court has never had to directly face the question of whether the giving of the bifurcated charge constitutes error. However, we have indicated our preference for a unitary charge. In United States v. Silver, 457 F.2d 1217 (3d Cir. 1972), we called it a 'settled principle' that 'when the defense of entrapment is properly raised the burden of proof is on the Government to prove beyond a reasonable doubt that the defendant was not entrapped'" 457 F.2d at 1220.
>
> "Furthermore, in Government of the Virgin Islands v. Cruz, 478 F.2d 712 (3d Cir. 1973), decided after the district court decision in this case, we approved of an instruction which places the burden on the Government to disprove the whole defense beyond a reasonable doubt.
>
> Under the unitary approach we require, inducement therefore enters as an element of predisposition which the Government must disprove rather than as an independent element which the defendant must prove.
>
> Pragmatic considerations also inhibit us from approving an entrapment charge involving two elements, with different burdens of proof on different parties for each element. We see no

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> valid justifications for imposing such a confused standard on a jury in a criminal case for a judicially created defense which, as pointed out above, involves essentially a single element. Indeed, we are supported in this view by the Government brief in this case which concedes that 'it must fairly be said that the initial treatment in the charge of the entrapment issue could generate confusion on the part of the jury.'"

The trial court's error in charging the jury deprived the petitioner of a fair determination of the issues.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

s/ Kenneth Kaplan
Attorney for Petitioner

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APPENDIX A

JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of December, one thousand nine hundred and seventy-five.

Present:

HON. PAUL R. HAYS
HON. WILLIAM H. TIMBERS
HON. MURRAY I. GURFEIN

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

CARLOS FAYAD and PAULA DALLAL,

Appellants.

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Judgment of Court of Appeals

75-1343

Appeal from the United States District Court for the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby is *affirmed*. The mandate shall issue forthwith.

s/ Paul R. Hays
PAUL R. HAYS

s/ William H. Timbers
WILLIAM H. TIMBERS

s/ Murray I. Gurfein
MURRAY I. GURFEIN

Circuit Judges.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1020

PAULA DALLAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court's jury instruction on entrapment was incorrect.

After a jury trial in the United States Court for the Eastern District of New York, petitioner was convicted of distribution and conspiracy to distribute quantities of cocaine, and co-defendant Carlos Fayad was convicted of possession and conspiracy to distribute quantities of cocaine, in violation of 21 U.S.C. 841(a)(1) and 846 and 18 U.S.C. 2.[1] Petitioner was sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5010(b), for treatment and supervision until discharged. The court of appeals affirmed without opinion (Pet. App. A).

---

[1]A third co-defendant, Robert O'Brien, pleaded guilty at the commencement of trial to one count of distribution of cocaine, and the charges on three remaining counts were dismissed as to him.

The government's evidence at trial showed that on March 7, 1975, an informant introduced undercover agent Alfred Cavuto of the Drug Enforcement Administration to petitioner, who immediately offered to sell Cavuto three-quarters of an ounce of cocaine for $900 and discussed the possibility of future drug sales. Petitioner then drove Cavuto to a meeting place where she introduced him to Robert O'Brien, who had the cocaine, and the sale was effected (Tr. 128-132, 276, 815-816, 869-873). On April 30, 1975, petitioner again drove Cavuto to a meeting with O'Brien, at which Cavuto purchased an ounce of cocaine for $1,300, $100 of which O'Brien gave petitioner for her role as middleman (Tr. 199-205, 454-455, 468, 862, 906-909).

On May 21, 1975, Cavuto arrested O'Brien after O'Brien had attempted to sell him eight ounces of cocaine. O'Brien then led Cavuto to his supplier, co-defendant Fayad, who was in O'Brien's apartment awaiting his share of the proceeds from the anticipated sale (Tr. 239-242, 248, 461-463, 643-644).

Petitioner's defense at trial was entrapment, and in support thereof she testified that the informant and Cavuto had repeatedly implored her to obtain cocaine for Cavuto, and that, despite her efforts to avoid them, she eventually agreed to their requests (Tr. 801-833, 913-925).

The district court's entrapment charge repeated virtually word-for-word the instruction requested by petitioner (compare Tr. 1103-1104 with page 59a of petitioner's appendix in the court of appeals and then included these two additional paragraphs (Tr. 1104-1105):

> The question of entrapment involves two issues. The first issue is whether the defendant was led or induced to commit the crime by anyone acting for

> the government. That is, did the government initiate the criminal transaction? On this issue the defendant has the burden of proof. She does not have to prove it beyond a reasonable doubt but she must prove it by a preponderance of the evidence. That is, she must satisfy you that it is more likely than not that the government initiated the criminal transaction involved in this case. If you do not find such inducement then there was no entrapment, but if you do find such inducement then you must consider the second issue.
>
> The second issue is whether the defendant was ready and willing to commit the crime without persuasion. This is sometimes expressed as an issue of whether he had a propensity to commit the crime. On this issue the government has the burden of proof and it must prove it beyond a reasonable doubt.

Petitioner claims that this instruction deprived her of a fair trial by incorrectly charging the jury as to the government's burden of proof.

1. We note at the outset that petitioner was not entitled to any entrapment instruction. She testified that she had been buying and using drugs for approximately two months prior to the government informant's initial approach to her (Tr. 886, 898); that she had been purchasing drugs from another individual who was supplied the drugs by O'Brien (Tr. 854); that she had arranged for yet another individual to purchase drugs directly from O'Brien (Tr. 848-849); that when Agent Cavuto first came to her apartment for the purpose of being introduced to and purchasing drugs from O'Brien she told him not to worry because she had acted as intermediary for previous drugs sales with O'Brien and no problems had arisen (Tr. 871); that on that first

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meeting with Cavuto she had offered to sell him a certain kind of marijuana cigarette (Tr. 871) and had shown him some golden colored marijuana in a plastic bag (Tr. 873); that she had told Cavuto that O'Brien would pay her for her part in the illegal transaction (Tr. 876-877); and that on another occasion she asked Cavuto whether he wished to purchase a quantity of methamphetamine (Tr. 885). Petitioner never once testified that before being approached by the informant she was a stranger to the drug trade or that she had resisted his requests because she was not a drug dealer. Rather, her own testimony established conclusively that she was an experienced and willing participant in various illegal drug transactions, for which she was paid a share of the proceeds. In sum, there was no evidence whatever from which the jury could have determined that petitioner had been "otherwise innocent" (*Sorrells* v. *United States*, 287 U.S. 435, 448) before the government informant first asked her whether she could arrange for a purchase of cocaine by the government agent; and when, as here, there is uncontroverted evidence of a defendant's propensity to commit a crime, the issue of entrapment need not be submitted to the jury (whether or not the government induced the crime). *United States* v. *Miley*, 513 F.2d 1191, 1202 (C.A. 2); *United States* v. *Riley*, 363 F.2d 955, 959 (C.A. 2).

2. In any event, the windfall entrapment instruction petitioner received did not deprive her of a fair trial. It is true, as petitioner points out (Pet. 5-6), that the preferred practice in the Second Circuit is to avoid a bifurcated instruction in favor of one charging the jury, once "some evidence of government initiation of the illegal conduct" has been found, to focus on the single question whether the government has proved predisposition beyond a reasonable doubt. *United States* v. *Braver*, 450 F.2d 799, 805 (C.A. 2), certiorari denied, 405 U.S.

1064. In this case, however, the giving of the disfavored form of the entrapment instruction could not conceivably have prejudiced petitioner. The rationale behind the dissatisfaction with the bifurcated charge is that it may confuse the jury and lead them to place too great a burden on the defendant of showing the initial inducement that is the threshold issue in entrapment cases. See *Notaro* v. *United States*, 363 F.2d 169, 175-176 (C.A. 9); *Kadis* v. *United States*, 373 F.2d 370, 373 (C.A. 1); *United States* v. *Watson*, 489 F.2d 504 (C.A. 3). But here is was undisputed that, by the pre-arranged introduction of petitioner to Agent Cavuto, the government initiated the particular transactions that occasioned this prosecution, and thus it cannot reasonably be supposed that the jury rejected petitioner's defense on the basis of the first half of the bifurcated instruction—*i.e.*, that petitioner had failed to show governmental initiation—rather than upon the second—*i.e.*, petitioner's predisposition.

Thus, even though in some cases the giving of the bifurcated entrapment instruction has been held to be reversible error (*e.g.*, *United States* v. *Watson*, *supra*), in this case the instruction amounted to harmless error at most. Petitioner points to no conflict among the circuits over the issue whether the "unitary" charge is to be preferred to the bifurcated, and indeed cites no decision holding that the latter instruction may not be harmless error in an appropriate case (the facts in *Watson*, *supra*, were markedly different from those here). Thus, the petition presents no issue of continuing importance worthy of review by this Court.

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It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

DOJ-1976-04